IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

APPEAL NO.885 OF 2005

IN

SUMMONS FOR JUDGMENT NO.379 OF 2004

IN

SUMMARY SUIT NO.349 OF 2004

...

M/s.Ritz Pvt.Ltd. ...Appellant

v/s.

Vijay R. Shukla ...Respondent

...

Mr.D.G.Rangras for the Appellant.

Mr.A.R.Bamne for the Respondent.

CORAM: D.K.DESHMUKH &

J.H.BHATIA, JJ.

DATED: 30TH AUGUST, 2007

P.C.:

1. The Appeal is not on board for final hearing. However, by consent of parties the Appeal is heard finally.

2. By this Appeal, the original Defendant challenges the order passed by the learned single Judge in summons for judgment No.379 of 2004. The Plaintiff had filed the summary suit for recovery of the price of the goods which according to the Plaintiff were supplied to the Defendant.

3. The defence of the Defendant was that he has not received the goods at all. Admitted position is that the Plaintiff has not produced a single document showing that the Defendant had actually received the goods. Perusal of the order of the learned single Judge shows that the learned single Judge has drawn an inference, from the conduct of the Defendant of not replying to the letters written by the Plaintiff, that the Defendant had received the goods.

4. In our opinion, from the conduct of the Defendant of not replying to the letters of the Defendant several inferences are possible. One of the inference possible is that the Defendant did not reply the letter because though he received the goods he did not want to make the payment. But the settled law is that when the court wants to base its conclusion on the inference, it can do so only if according to it that is the only inference that can be drawn from the facts, which are either admitted or have been clearly established. We also find that in the plaint the Plaintiff has filed two invoices being Invoice No.75 and Invoice No.76. Except for the difference in numbers both the invoices are identical. We do not find any explanation given by the Plaintiff in this regard.

5. Taking overall view of the matter, therefore, in our opinion, the defence that was raised by the Defendant particularly the defence that he has not received the goods cannot be termed as merely a moon shine defence. In our opinion, therefore, the learned single Judge ought to have granted unconditional leave to the Defendant to defend the suit.

6. In the result, therefore, Appeal succeeds and is allowed. The order impugned in the Appeal is set aside. Summons for judgment No.379 of 2004 is disposed of. Defendant is granted unconditional leave to defend the suit. Written statement to be filed within a period of eight weeks from today. The amount of Rs.1,20,000/- deposited by the Defendant pursuant to the order dated 18-10-2005 shall be permitted to be withdrawn by the Defendant, with accruals if any. Appeal disposed of.

(D.K.DESHMUKH, J.)

(J.H.BHATIA, J.)